



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**ELC. PETITION NO.22 OF 2019**

**GETRUDE MUKOYA MWENDA & OTHERS.....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY MINISTRY OF INFRASTRUCTURE,**

**HOUSING & URBAN DEVELOPMENT.....RESPONDENT**

**RULING**

1. This ruling is in respect of the preliminary objection dated 13<sup>th</sup> September 2019 by the 2<sup>nd</sup> Respondent that this court lacks the requisite original jurisdiction to hear and determine the petition and a dispute concerning the validity of the Environment Impact Assessment License dated 7/8/2007 by dint of the provisions of Section 129 of the Environmental Management and Rule 3 of the National Environment Tribunal Rules 2003.

2. The 2<sup>nd</sup> Respondent cited the case of **Owners of Motor Vessel "Lillian s" –v- Caltex Oil (Kenya) Ltd (1989) KLR** and submitted that in view of the fact that there are other forum specifically designed to deal with issues raised in the petition herein which forums the petitioners overlooked or ignored, this court lacks competence to hear and determine the petition together with the application filed herein. Counsel for the 2<sup>nd</sup> Respondent submitted that the issues raised by the petitioners herein do not suffice to be issues that can be raised by way of a constitutional petition to be litigated before this court. Counsel for the 2<sup>nd</sup> Respondent relied on the cases of **International Centre for Policy & Conflict & 5 Others –v- Attorney General & 4 Others (2013) eKLR; Papinder Kaur Atwal –v- Manjit Singh Amrit Nairobi Petition No.236 of 2011; Re Application by Bahadur(1986)(const); Minister of Home Affairs – v- Bickle & Others (1985)LRC const; and COD & Another –v- Nairobi City Water & Sewerage Company Limited (2015)eKLR**. It was counsel's submission that the petition raises issues that can only be litigated before the National Environmental Tribunal in the first instance. It was submitted that the process and procedure for application and issuance of a license is well provided under the Environmental Management and Coordination Act (EMCA) and the Environmental (impact Assessment and Audit) Regulations 2003. The 2<sup>nd</sup> Respondent's counsel cited Section 58 of EMCA which provides that any person, before commencing any development of any property must apply for a License from the National Environment Management Authority (NEMA) by submitting a project report prepared by a registered Environmental Impact Assessment Expert. The Director General of NEMA is then to assess the application and submit it to the lead agencies for comments in accordance with Section 60 of EMCA.

3. The 2<sup>nd</sup> Respondent submitted that it complied with the aforesaid requirements and the Environmental Impact Assessment License Number 0001206 was issued to it on 7<sup>th</sup> August 2007. That Section 126 of EMCA establishes the National Environmental Tribunal to hear and determine any complaints raised under EMCA while Section 129 provides for institution of suits in relation to issuances of licenses by providing that any person who is aggrieved by the decision to grant or deny a license or permit, the transfer of a license or permit may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the Tribunal. Section 130 of EMCA provides that appeals from the Tribunal shall be filed in the Environment and Land Court within 30 days. The 2<sup>nd</sup> Respondent's counsel cited the case of **Speaker of National Assembly –v- Njenga Karume (1992)eKLR; Geoffrey Muthinja & Another – v- Samuel Muguna Henry & 1756 Others (2015) eKLR; Taib Investment Limited – v- Fahim Salim Said & 5 Others (2016)eKLR; Godfrey Paul Okutoyi –v- Habil Olaka & Central Bank of Kenya (2015)eKLR; and Mutanga Tea & Coffee Company Ltd –v- Shikara Limited & Municipal Council of Mombasa (2015)eKLR** and submitted that the motion and the entire petition wholly violates the exhaustion doctrine. That the petition is not one to be determined by this court in the first instance. It was submitted that the petitioners have not exhibited having taken any step in pursuance of the prescribed procedure and have not shown any cognizable reasons for their failure to abide by the stipulated procedure. It is the 2<sup>nd</sup> respondent's submission that the motion, the entire petition and the prayers sought therein are prematurely before this court and therefore fatally defective and which defect cannot be remedied by Article 159 (2)(d) of the Constitution.

4. The preliminary objection is supported by the 3<sup>rd</sup> Respondent. Counsel for the 3<sup>rd</sup> Respondent echoed the submissions of the 2<sup>nd</sup> Respondent and submitted that this court does not have jurisdiction to hear and determine the matters in the petition and the application in view of the establishment and existence of the National Environment Tribunal (NET) which is seized of the authority to hear and determine such matters. Counsel for the 3<sup>rd</sup> Respondent relied on the case of **Joseph Owino & Another –v- NEMA & Africa Plysack Ltd**

**(2014)eKLR; Isaac Ngugi –v- Nairobi Hospital & Another (2013) eKLR; Rich Productions Ltd –v- Kenya Pipeline Limited & Public Procurement Oversight Authority (2014) eKLR; Damian Befonte –v- The Attorney General of Trinidad and Tobago, C.A No. 84 of 2004.** It is the 3<sup>rd</sup> Respondent’s submission that a party cannot be heard to move a court in glaring contradiction of the judicial hierarchical system of the land and cited the case of the **The Speaker of the National Assembly –v- James Njenga Karume (1992)eKLR and Kones –v- Republic and Another Ex Parte Kimani Wanyoike & Others (2008) 3 KLR; Rodgers Muema Nziaka –v- AG, Nairobi Petition No.613 of 2006; David Ramogi & 4 Others –v- The Cabinet Secretary Ministry of Energy & Petroleum & 7 Others (2017)eKLR, and Eric Wambua Muli & Another –v- Prime Bank Limited & 3 Others (2017) eKLR.**

5. The petitioners opposed the preliminary objection and submitted that Section 13 (2) (a) of the Environment and Land Court Act grants powers to this court to hear and determine disputes relating to environmental planning and protections, climates issues, land use planning, title tenure, boundaries, rates, rent valuations, mining, minerals and other natural resources and any other dispute relating to environment and land. While citing Section 13(3) of the ELC Act, Counsel for the petitioners submitted that the court must not be stopped from hearing any claim of violation or threat of such a violation, to a clean and healthy environment. That the petitioners are seeking a declaration that the activities of the respondents and particularly of sand harvesting along the southern Coast of Kenya contravenes and infringes on the petitioners right to a clean and healthy environment pursuant to Article 10 and 42 of the Constitutions of Kenya, and the petitioners have demonstrated their fear, concern and proof that the 2<sup>nd</sup> Respondent’s sand harvesting activities may or are causing great damages, even in circumstances where there is evidence of issuance of an Environmental Impact Assessment License, and that even if the suit was based purely on a NEMA decision, it does not mean that the court has no jurisdiction. It was submitted that even if the relevant statute (i.e. EMCA) was to grant the petitioners other avenues for redress, the court will still have jurisdiction to deal with the petitioners’ claims as against the Respondents. Counsel for the petitioners submitted that the authorities relied on by the 2<sup>nd</sup> Respondent can be differentiated or distinguished with the facts in the petition herein. It was further submitted that the National Environmental Tribunal’s jurisdiction does not cover the matters before this court because the Tribunal cannot grant the prayers sought by the petitioners in the petition and the Notice of Motion herein and submitted that this court ought not to shy away from exercising its mandate as donated by Articles 70, 162 (2) (b) of the Constitution of Kenya, Section 13(2), (3) of the Environment and Land Court Act and Section 3 of the Environmental Management and Coordination Act to hear the petition herein and determine whether indeed the petitioners rights have been violated. The following cases were also cited. **Patrik Njenga Mburu & 98 Others –v- National Environmental Management Authority & 6 Others (2019) eKLR; Peter Karuing’o –v- Hijaz Development Ltd & 4 Others (2018)eKLR; John Kabukuru Kibichu & Another –v- County Government of Nakuru & 2 Others (2016)eKLR and Ken Kasing’a –v- Daniel Kiplagat Kirui & 5 Others (2015)eKLR.**

6. I have considered the submissions rendered in support and against the preliminary objection. The main issue in the preliminary objection raised is whether this court has no jurisdiction to entertain the suit. The respondents argue that if the petitioners were not happy with the environmental impact assessment license issued on 7<sup>th</sup> August 2007, they ought to have filed suit before the National Environment Tribunal (NET). That this court lacks original jurisdiction to entertain the suit adding that the petitioners could only appeal to this court if they were aggrieved by the decisions of NET.

7. The case before this court is a constitutional petition alleging violations of various rights enshrined in the constitution, including violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution and the right to exploitation of natural resources, eliminate processes and activities that are likely to endanger the environment as provided for in Article 69 of the constitution. There is no denial that the violation of the right to a clean and healthy environment is anchored on the EIA license issued. NET is established by Section 125 (1) of EMCA and its jurisdiction is set out in Section 129. Appeals on the decisions of the Tribunal lay to this court under Section 130 of EMCA. The jurisdiction of this court as given in Article 162(2)(b) and Section 13 of the Environment and Land Court Act means that the court can hear any matter related to the environment and land. The petition herein is one such matter. NET does not hear constitutional petitions as its mandate is only to hear appeals on NEMA decisions. NEMA is established under Section 7 of EMCA and its mandate as provided by Section 9 is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. Part of this mandate is to grant or deny Environmental Impact Assessment (EIA) Licences. A person who is aggrieved by the decisions of NEMA may appeal to the Tribunal which can confirm, set aside or vary such decision. As already stated, if a person is aggrieved by a decision of Tribunal, the Act provides that such a person can pursue a final appeal to the Environment and Land Court (ELC). As already stated under Article 162 (2)(b), the ELC has the mandate to hear disputes relating to the environment and the use and occupation of, and title to land. Section 13(1) of the Environment and Land Court Act provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to the environment and land. Section 13(2)(a) provides such disputes to include disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, mineral and other natural resources. Section 13(2)€ makes clear that what is set out in paragraph (a) to (d) thereof is not conclusive. The same provides that the ELC can hear any other dispute relating to the environment and land. Therefore, unlike the NET, this court is the only one mandated to hear and determine application for redress for a denial, volition or infringement of, or threats to, rights relating to environment and land.

8. Therefore it is my finding that the preliminary objection raised by the 2<sup>nd</sup> respondent is not merited. I dismiss it with no order as to costs

**DATED, SIGNED and DELIVERED at MOMBASA this 23<sup>rd</sup> day of January 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ngoya for 2<sup>nd</sup> respondent

Mwandeje for 1<sup>st</sup> respondent

Kalimbo holding brief for Midikira for petitioners

Yumna Court Assistant

**C.K. YANO**

**JUDGE**